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INHERENT ATTORNEY CONFLICTS OF INTEREST UNDER ERISA: USING THE MODEL RULES OF PROFESSIONAL CONDUCT TO DISCOURAGE JOINT REPRESENTATION OF DUAL ROLE FIDUCIARIES

PAUL M. SECUNDA*

I. INTRODUCTION: THE MYSTERY OF *VARITY CORP. v. HOWE*

Most people who have read the United States Supreme Court's opinion in *Varity Corp. v. Howe*¹ are struck by the unbelievable machinations in which an employer will engage to deprive his employees of their rightful health benefits under ERISA.² In *Varity*, the company, acting in the dual role of employer and plan fiduciary with regard to the company's health plan, carried out a devious scheme to rid itself of its unprofitable divisions.³ In so doing, the employer induced a large number of employees to shift from their current health insurance plan to a new health plan with a newly-formed subsidiary.⁴ Although the company promised that the new subsidiary's health plan would pay the same health benefits, unbeknownst to these employees, that subsidiary was doomed to fail from the moment of its existence.⁵ When the subsidiary did inevitably sink into

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1. 516 U.S. 489 (1996).

2. Employee Retiree Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. (2000). As per convention, citation to ERISA sections in this article have been conformed to the standardized citation form of ERISA §____, which substitutes for citations to Title 29 of the United States Code.

3. 516 U.S. at 492-94.

4. *Id.* at 493-94. In all, some 1500 employees accepted the company's assurances and voluntarily agreed to transfer to the new subsidiary. *Id.* at 494.

5. *Id.* The district court found that the subsidiary from the date of its creation had a \$46 million negative net worth. *Id.*

receivership, the employees of the subsidiary not only lost their jobs, but also their health benefits.⁶

What confuses many students and practitioners who read *Varity* is why the employer utilized such an elaborate ruse to trick his employees into forfeiting their health benefits. Under the well-established settlor-function doctrine, an employer is free in his settlor capacity⁷ to create, amend, modify, or terminate an employee benefit plan without being considered a fiduciary of the plan and risking fiduciary liability under ERISA.⁸ Thus, if the employer wished to rid himself of the liabilities associated with the health plan, he could have simply modified or terminated the plan to achieve the desired savings.⁹

In explaining the company's motives in *Varity*, the Supreme Court assumed that the company took such a circuitous route in depriving employees of their benefits in order to avoid the "undesirable fallout" of "distressing" the remaining employees.¹⁰ Instead, by putting into action this scheme, the company hoped to convince the remaining employees that the other employees' benefits were "simply and automatically" terminated by the failure of the subsidiary's business.¹¹ Thus, as interpreted by the Supreme Court, the company took such a convoluted course of action in order to maintain the morale of its remaining employees and, by extension, the company's productivity.

Be that as it may, an equally plausible alternative motivation for the company's bizarre actions might have been related to the difficult position in which a company places itself when it acts simultaneously in both the role of employer and ERISA plan fiduciary with regard to its employees. In such a situation, a dual role fiduciary exists and it becomes difficult to ascertain the capacity in which the company is interacting vis-à-vis its employees.¹² Of course, the *Varity* Court ultimately decided that the company was acting in its fiduciary capacity when it induced its employees to switch over to the doomed subsidiary's health

6. *Id.*

7. A settlor is the "person who creates a trust." RESTATEMENT (SECOND) OF TRUSTS § 3(1)(1959).

8. *Varity*, 516 U.S. at 505 (citing *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78-81 (1995)).

9. The *Varity* Court recognized that the company had retained the right to terminate the health benefits at issue, but did not do so. *Id.* at 493.

10. *Id.*

11. *Id.*

12. As discussed in more detail below, ERISA expressly permits an employer to act as both fiduciary and non-fiduciary (including in the role of settlor) under ERISA § 408(c)(3). See discussion *infra* Part II.B.

plan.¹³ Thus, it may have been that the company's actions in *Varity* were also a means by which the company hoped to avoid having a court decide whether it was acting in its employer or plan fiduciary capacity by tying the loss of employee health benefits to the "simple and automatic" dissolution of the newly-formed subsidiary.¹⁴

Read this way, *Varity* highlights how important it is that a company be adequately counseled by its attorneys when it is acting as a dual role fiduciary under ERISA in order to make sure that it does not inadvertently expose itself to fiduciary liability as *Varity* did. That being said, there is nothing in ERISA which discusses the role counsel should play in dual role fiduciary cases like *Varity*.¹⁵ Further, there is no formal legal restriction in ERISA or anywhere else which prohibits an attorney from jointly representing a given company in both its employer and fiduciary capacities.¹⁶

13. See *Varity*, 516 U.S. at 503 ("We conclude . . . that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the District Court's legal conclusion that *Varity* was acting as a fiduciary.").

14. As the Court's ultimate decision makes clear, there was good reason for the company to want to avoid this employer/fiduciary determination. *Id.* Ironically, if the company had just relied on the settlor function doctrine, and modified the plan outright, it would not have had to worry about being characterized as an ERISA fiduciary.

15. "Regulation of ERISA lawyers was left primarily to state law, which generally is based on ethical standards promulgated by the American Bar Association." Gwen Thayer Handelman et al., *Fundamentals of Employee Benefits Law, Ethics, Privilege, and Related Issues in Employee Benefits Practice*, SJ068 ALI-ABA 719, 725 (2004). Another reason ERISA has little to say about the role of attorneys in these dual role fiduciary situations is that it is generally agreed that the plan's attorney is not acting in a fiduciary capacity. See Ronald E. Mallen & Paul E. Vallone, *Attorney Liability Under ERISA: Myth or Reality*, 68 DEF. COUNS. J. 435, 435-36 (2001) ("Attorneys who perform services on behalf of a plan are seldom designated as fiduciaries in the plan documents. Thus, attorneys must perform more than the 'usual professional services' to be considered an ERISA fiduciary."); see also *Useden v. Acker*, 947 F.2d 1563, 1577-78 (11th Cir. 1991) (finding that attorney's occasional rendering of investment advice to ERISA plan did not render attorney a fiduciary to plan).

16. Indeed, it is difficult to discern from the *Varity* decision whether the same attorney represented the company in both its employer and fiduciary capacities in that case. Moreover, even if the employer's counsel jointly represented the employer in both capacities, courts have not found a "duty to hire [an] independent counsel to help the [plan] committee interpret and administer the plan." See *Ashenbaugh v. Crucible Inc.*, 1975 Salaried Retirement Plan, 854 F.2d 1516, 1531-32 (3d Cir. 1988); *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982) (not requiring dual role fiduciaries to hire

Nevertheless, a common observation by sophisticated ERISA attorneys is that it never wise to engage in such dual representations.¹⁷ Cases, including the famous *Donovan v. Bierwirth* case detailed below,¹⁸ however, do suggest that at least some lawyers DO undertake such dual representations, either inadvertently or purposefully,¹⁹ even in light of the many ethical and legal difficulties associated with such dual representations.²⁰

independent counsel in all conflict of interest situations).

17. *But see* Handelman, *supra* note 15, at 772 (implying that ERISA dual representations may be more widespread than previously thought, by noting that "it is possible to preserve the attorney-client privilege with respect to advice given to a plan sponsor about settlor functions *even if the same firm advises both the fiduciaries and sponsor*") (emphasis added).

18. *Donovan*, 680 F.2d 263. *See infra* Part IV.A (discussing the *Donovan* case).

19. "Multiple representation in employee benefits practice may occur inadvertently or by design." Handelman, *supra* note 15, at 734. *See also* ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 1442 (2d. ed. 2000) [hereinafter EMPLOYEE BENEFITS LAW] ("[I]nadvertent [multiple] representation may occur when a lawyer advises corporate employees acting on behalf of a client corporate plan sponsor that is a named fiduciary if the employees are found also to be functioning as fiduciaries in their own right" and that "[i]f a plan sponsor hires counsel to represent the plan, both the plan entity and the plan sponsor may be considered clients for conflicts-of-interest purposes."). *Id.* (citing *Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 WL 239940 (N.D. Cal. June 6, 1991)).

20. *See* Sherwin P. Simmons, *Who Are the ERISA Clients? Plan Fiduciaries or Plan Participants?*, 55 TAX NOTES 1240, 1242 (1992) ("All too often, in 'real life,' the same attorney [advises] the plan sponsor, usually on non-plan matters as well as plan matters, the plan, and the plan fiduciaries."). For examples of instances in which counsel have undertaken dual representation of both plan sponsors and plan fiduciaries, and where litigation has ensued, *see* *United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (ERISA attorney-client privilege case in which lawyer represented the fiduciaries, the plan, and the company); *In re Long Island Lighting Co.*, 129 F.3d 268, 271 (2d Cir. 1997) (ERISA case regarding attorney-client privilege issues in which the employer client used the same attorney to advise it on both settlor functions and fiduciary functions); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982) (ERISA case in which former legal counsel to plan also worked for outside general counsel to plan sponsor without any separation of services between various activities).

Even if more sophisticated in-house and outside ERISA attorneys understand the dangers in representing a dual role fiduciary in both its corporate entity and fiduciary capacities (for instance, because of the potential loss of attorney-client and work product doctrine privilege with regard to plan participants, *see* EMPLOYEE BENEFITS LAW, *supra* note 19, at 1442 ("If conflicts between co-clients result in litigation, communications about plan administration with a lawyer who has represented more than one party with respect to the plan generally will not be protected under the attorney-client privilege or work product doctrine.")), there will inevitably be less sophisticated attorneys who will inadvertently and purposefully undertake

Therefore, to ethically guide those attorneys who do find themselves considering engaging in such ERISA joint representations, this article uses the relevant provisions of the Model Rules of Professional Conduct to discern the potential pitfalls of such representations.²¹ The Model Rules speak generically of how to identify the client in corporate situations²² and how to resolve concurrent conflicts of interests between co-clients.²³ However, neither the Model Rules themselves nor any of the commentary on the Rules, addresses specific circumstances in which an attorney (whether in-house or outside counsel)²⁴ is permitted to jointly represent the employer *qua* employer, as well as the employer as the fiduciary of an ERISA plan.²⁵

Because the current Model Rules as written do not contain sufficient guidance for attorneys contemplating representing ERISA dual-role fiduciaries in both capacities, this article proposes a modification to the current Model Rules that would address such "inherent attorney conflict of interest situations" under ERISA.²⁶ Although the new provision, denominated Rule

such dual role ERISA representations. It is these less sophisticated attorneys who will most clearly benefit from the proposed amendment to the Model Rules of Professional Conduct discussed herein.

21. It is uncontroverted that the Model Rules of Professional Conduct, through their state analogues, apply to ERISA attorneys as much as they apply to any other attorney. See Andrew L. Oringer & Jason M. Rothschild, *Navigating Murky Waters: Ethics for the ERISA Lawyer in a Post-Enron World*, 649 PLI/TAX 349, 359 (2005) ("Like other attorneys, ERISA attorneys must practice in accordance with the applicable state law standards for attorney conduct, which are generally based on the standards provided by the American Bar Association in the Model Rules of Professional Conduct (the "Model Rules"). It is noted that state rules will generally control, and that the Model Rules are not themselves applicable.").

22. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003)(discussing organizations as clients).

23. *Id.* at R. 1.7.

24. The Model Rules generally do not make a distinction between in-house and outside counsel when discussing the representation of corporate entities. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 486 (2005)(discussing the similarity between corporate and non-corporate entities).

25. Because employers commonly become ERISA dual role fiduciaries, see Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1126 (1988) (observing that employers "routinely exercise [the] authority" to act as dual role fiduciaries), these types of dual representation ethical issues inevitably will arise.

26. Although "[t]he interests of a plan sponsor, fiduciaries, and beneficiaries are not inherently adverse, [they] may become so in the event of a trustee deadlock, employer delinquency, or litigation." Handelman, *supra* note 15, at 737. As I will argue, I refer to these dual representation situations as "inherent attorney conflicts of interest" because of the inevitability of some

1.13(h), would not ban outright joint representation of dual role fiduciaries under ERISA,²⁷ it would establish a strong presumption against such joint representations.²⁸ This presumption against joint representation is based on the inevitable conflicts of interest that develop between the non-fiduciary interests of the employer in making business decisions and the fiduciary interests of the employer as plan administrator in acting in the best interests of the plan's participants and beneficiaries.²⁹ The *Varity* case paradigmatically demonstrates this conflict of interest dynamic.³⁰

The proposed rule and commentary would also require that counsel assure herself under the conflict of interest principles for current and former clients under Model Rules 1.7 and 1.9 that such recurring conflicts will not jeopardize the effectiveness of the legal representation for either the company or the plan.³¹ Only then can counsel ethically carry on a joint representation under these circumstances. Even then, the potential loss of evidentiary privileges, such as attorney-client privilege and the work product doctrine privilege, may lead counsel to decline dual representation.³²

In short, the proposed revision to the Model Rules is necessary because even though it may be the general practice of sophisticated ERISA counsel to always decline such joint representations, there should nevertheless be some express ethical guidance in place to put on notice those who are not as familiar with the legal minefield that is ERISA and so that junior

such conflict arising when the employer acts in dual capacities in these scenarios. *See infra* Part V.A.

27. *See infra* note 134 (discussing the proper role of ethical guidelines).

28. *See* discussion *infra* Part V.B. (discussing proposed Model Rule on ERISA joint representations).

29. *See* discussion *infra* Part II.B. *See also* Handelman, *supra* note 15, at 741 (observing that under Model Rule 1.16, "counsel for co-clients may have an ethical duty to withdraw from representing both the employer and the plan if their interests become adverse").

30. *See Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) ("Varity was *both* an employer *and* the benefit plan's administrator, as ERISA permits.") (emphasis in the original).

31. As will be discussed in more detail below, these types of situations may implicate Model Rule 1.9 dealing with former clients in cases in which an attorney has initially represented the dual-role fiduciary in both capacities, but currently seek to represent the entity in only one capacity. *See infra* Part III.C.

32. EMPLOYEE BENEFITS LAW, *supra* note 20, at 1442 ("If conflicts between co-clients result in litigation, communications about plan administration with a lawyer who has represented more than one party with respect to the plan generally will not be protected under the attorney-client privilege or work product doctrine.").

attorneys in ambivalent ethical situations can back up their stance by pointing to clear ethical guidelines.³³

This article presents the argument for proposed Model Rule of Professional Conduct 1.13(h) in five parts. Part II introduces fiduciary law under ERISA and explains the reasons for, and the characteristics of, the dual role fiduciary. Part III discusses how the Model Rules of Professional Conduct generally inform the ethical conduct of an attorney when she represents two potentially adverse entities simultaneously. Part IV documents the lack of ethical guidance provided to counsel in the dual role fiduciary context under the current version of the Model Rules through the explanatory device of the famous ERISA fiduciary case of *Donovan v. Bierwirth*. Part V concludes by proposing Rule 1.13(h), with commentary, which establishes a strong presumption against corporate counsel simultaneously representing the employer in its corporate and ERISA plan fiduciary capacities.

II. A BRIEF ERISA FIDUCIARY LAW PRIMER

In analyzing an attorney's ethical obligations to a corporation in both its employer and plan fiduciary capacities, it is helpful to first understand who is a fiduciary under ERISA and the consequences attendant to such designations. Thereafter, it is necessary to examine how ERISA law makes a significant departure from the common law of trusts;³⁴ a departure which permits a dual role fiduciary to exist in the first instance.³⁵ This

33. The importance of having such ethical guidance in place for junior attorneys facing tough ethical quandaries is made evident through consideration of the case of *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), discussed below. See *infra* Part IV.A.2.

34. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (describing ERISA as having its roots in the common law of trusts).

35. Generally, under the common law of trusts, the same person cannot be both the settlor and fiduciary at the same time, as trustees at common law are not permitted to act in a disloyal manner to the interests of the beneficiaries of the trust. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (holding that a trustee at common law "bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.'"); see also RESTATEMENT (THIRD) OF TRUSTS § 78 (2005) (discussing the more stringent duty of loyalty under the common law of trusts). But see John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L. J. 929, 933-34 (2005) (suggesting that a trustee's duty of

section will examine these background issues in detail so that the reader may more readily comprehend the ethical quandary in which corporate counsel finds herself when contemplating jointly representing an ERISA dual role fiduciary.

A. *Fiduciary Status and Obligations Under ERISA*

In order to establish an employee benefit plan under ERISA,³⁶ it is necessary to fulfill a number of technical prerequisites.³⁷ At the very least, every plan must be established and maintained by a written instrument.³⁸ Importantly, this written instrument must provide for one or more named plan fiduciaries that are jointly and severally responsible for controlling and managing the operation and administration of the plan.³⁹ Furthermore, an employee benefit plan may provide that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan.⁴⁰ For instance, one person can serve in the role of both administrator and trustee to the plan.⁴¹

An equally significant prerequisite for an employee benefit plan under ERISA is that its assets be held in trust by one or more trustees.⁴² These trustees, in turn, have exclusive authority and

loyalty be softened such that actions taken with "the best interest" of the beneficiary in mind should be permitted).

36. An employee benefit plan can either be an employee pension benefit plan or employee welfare benefit plan, which is established or maintained by the employer for the purpose of providing certain designated benefits to plan participants and beneficiaries. ERISA §§ 3(1)-(3).

37. In addition to the technical requirements under ERISA, employee pension plans must meet certain qualification standards under the Internal Revenue Code (IRC) for employers and plan participants to be able to qualify for tax advantages associated with the employee benefit plan. See U.S.C. § 401 (2002).

38. ERISA § 402(a)(1).

39. *Id.* The named plan fiduciary can either be named specifically in the plan document, named pursuant to a procedure specified in the plan, or identified as a fiduciary by an employer or employee organization. *Id.* Moreover, the plan must describe a procedure for the allocation of responsibilities for the operation and administration of the plan. ERISA § 402(b)(2).

40. ERISA § 402(c)(1).

41. *Id.*

42. § 403(a). In fact, the primary source for the fiduciary responsibilities contained in ERISA is the common law of trust. See *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (citing *Central States, Southeast, and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)). That being said, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.* at 497 (citing ERISA § 2).

discretion to manage and control the assets of the plan.⁴³ Nevertheless, not all fiduciaries are created equal as far as their responsibilities to the plan are concerned. Whereas ordinary trustees have discretion and control over all facets of plan management and administration, directed trustees are only fiduciaries "to the extent" that they exercise discretionary control over some plan function.⁴⁴ Moreover, these directed trustees are required to follow the directions of other trustees, unless such actions would be in violation of Title I of ERISA.⁴⁵ Thus, whereas a plan administrator is likely to be both the named fiduciary and an ordinary trustee of the plan, a bank which holds the plan assets, though also a fiduciary, will more likely be a directed trustee whose fiduciary liability is limited to the extent that it discretionarily administers the plan.⁴⁶

If an individual is considered a fiduciary or trustee of a plan, she owes a number of fiduciary duties to the plan. These fiduciary duties can be generically divided into four categories: (1) the duty of loyalty (exclusive benefit rule); (2) the duty of prudence; (3) the duty of prudent diversification; and (4) the duty to follow the terms of the plan unless contrary to the terms of ERISA.⁴⁷

For purposes of this article, the most important of these duties is the duty of loyalty which requires a fiduciary or trustee to look with an "eye single" toward the interest of the participants and beneficiaries and to act for the exclusive purpose of providing benefits to participants and their beneficiaries.⁴⁸ Quite literally,

43. ERISA § 403(a).

44. ERISA § 403(a)(1) (describing the role of the directed trustee). *See also* § 3(21)(A) ("[A] person is a fiduciary with respect to the plan *to the extent* (i) he exercises any discretionary authority . . . respecting management of such plan . . . , (ii) he renders investment advice for a fee or other compensation, . . . or (iii) he has any discretionary authority . . . in the administration of such plan.") (emphasis added).

45. ERISA § 404(a)(1)(D).

46. ERISA § 3(21)(A)(iii); § 403(a).

47. ERISA § 404(a)(1)(A)-(D). There are, of course, other types of fiduciary duties, including co-fiduciary duties under ERISA § 405 and the prohibited transaction rules under ERISA §§ 406-408, but those topics are beyond the scope of this article.

48. ERISA § 404(a)(1)(A). Judge Friendly first used the "eye single" terminology in *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d. Cir. 1982). Closely connected to this duty of loyalty is the duty of care which requires a fiduciary to act in the same manner as a prudent fiduciary would under the same circumstances. ERISA § 404(a)(1)(B). Not uncommonly, not acting in the best interests of, or for the exclusive benefit of, the participants and beneficiaries of a plan will also involve conduct inconsistent with the expected actions of a prudent ERISA fiduciary. *See Donovan*, 680 F.2d at 271 ("Sections 404(a)(1)(A) and (B) impose three different although overlapping standards.").

this means that plan fiduciaries cannot place their own interests, or that of others (including their company's), over the interests of the participants and beneficiaries of the plan. If the fiduciary does not meet these stringent standards, she may be held personally liable to the plan for any plan losses or ill-gotten personal profits caused by the breach of fiduciary duty.⁴⁹

B. The Inherently Conflicted ERISA Dual Role Fiduciary

In addition to all the provisions discussed above concerning ERISA fiduciary status, one additional consideration for the drafters of ERISA was whether to permit a company to act in both an employer and plan fiduciary capacity at the same time.⁵⁰ If a company were permitted to act simultaneously as both the employer and a fiduciary to a plan, there could potentially be competing interests. This is because corporate officers would have to act in a fiduciary capacity with regard to their shareholders,⁵¹

49. ERISA §§ 409, 502(a)(2). On the other hand, non-fiduciaries are generally considered not liable under ERISA. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (finding no non-fiduciary liability under ERISA § 502(a)(3) for knowing participation in a breach of fiduciary duty). But see *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241 (2000) (permitting non-fiduciary liability for a "party in interest" involved in a prohibited transaction with a fiduciary under ERISA § 502(a)(3)).

50. Traditionally, under the common law of trusts, this conundrum was not usually at issue for two reasons. First, the settlor was usually dead by the time the trust fiduciary started to exercise her fiduciary powers and consequently, the settlor and fiduciary were not the same person. See Jeffrey E. Shuren, *Legal Accountability for Utilization Review in ERISA Health Plans*, 77 N.C. L. REV. 731, 760-61 (1999) ("Under an ordinary private trust, the property owner, or settlor, transfers property for the benefit of one or more beneficiaries to a third party, the trustee. The rationale behind imposing fiduciary obligations on the trustee stems from the typical trust creation scenario wherein the settlor may die or the beneficiaries are incapable of managing the funds."). Second, the trustee only had that power invested in her by the settlor. See *Mertens*, 508 U.S. at 262 (noting that under the common law, fiduciary status was determined by virtue of the position a person held). This is not so in ERISA, where a person can become a functional fiduciary of the plan through undertaking discretionary actions on behalf of the plan even if that person seeks to avoid fiduciary status or liability. See ERISA § 3(21)(A); *Varity Corp. v. Howe*, 516 U.S. 489, 527 (1996) (Thomas, J., dissenting) ("In defining the term 'fiduciary' in § 3(21)(A) of ERISA, Congress struck a balance that it believed would protect plan participants without impinging on the ability of employers to make business decisions. In recognition that ERISA allows trustee-beneficiary arrangements that the common law of trusts generally forbids, Congress 'defined 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan.'") (citing *Mertens*, 508 U.S. at 262).

51. See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) ("Corporate directors have a fiduciary duty to make decisions

while as trustees of the plan, they would have to act in the best interests of the participants and beneficiaries of the plan.⁵² As *Varity* establishes, these types of scenarios involving conflicting fiduciary duties in the ERISA context are not uncommon.⁵³ In such circumstances, particular individuals might be called upon to act in both an employer and a plan fiduciary capacity for the company at the same time.⁵⁴

Nevertheless, even in the face of these considerations which would seem to argue against allowing dual role fiduciaries, ERISA

that are in the best interests of the shareholders.”).

52. See ERISA § 404(a)(1)(A). Moreover, unlike under traditional trust law, employers and their employees can inadvertently become fiduciaries under ERISA by engaging in discretionary action as concerns the plan and its assets. ERISA § 402(a); ERISA § 3(21)(A). Thus, employers may have dueling fiduciary obligations to shareholders and plan beneficiaries without even realizing it. See *EMPLOYEE BENEFITS LAW*, *supra* note 20, at 1441-42 (noting that multiple representations under ERISA may occur “inadvertently or by design,” and that inadvertent representations should be avoided); see also *Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co.*, No. 91-5433, 1994 WL 62124, at *3 (D.N.J. Feb. 23, 1994) (finding that inadvertent representation under ERISA may occur due to a party’s perception).

53. See *Varity*, 516 U.S. at 493-94; see also Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 141 (2004) (“When the same plan fiduciary, however, also serves as an officer or director, and therefore as a fiduciary to the company shareholders (and the company itself), conflicts inevitably arise.”). Not only will such interests conflict with important decisions regarding the very survival of the company, but such conflicting fiduciary duties occur on an every day basis regarding decisions as mundane as whether to deny a specific claim under a plan or deciding to have a plan invest in company stock as a plan asset. See COLLEEN N. MEDILL, *INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE* 409 (2004).

54. In such situations, Judge Friendly counseled, “[s]ince their judgment . . . could scarcely be unbiased, at the least [these dual role fiduciaries] were bound to take every feasible precaution to see that they had carefully considered the other side, to free themselves, if indeed this was humanly possible, from any taint of the quick negative reaction characteristic of targets of hostile tender offers.” *Donovan*, 680 F.2d at 276. That being said, it is not a breach of fiduciary duty if the individual’s decision as a fiduciary results in an incidental benefit to the employer. *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987). But see *Fischel & Langbein*, *supra* note 25, at 1128:

The device of characterizing the benefit to the employer as ‘incidental’ misses the point by confusing the ex ante and ex post perspectives. The relevant question is not whether the trustee’s conduct creates only an ‘incidental’ benefit for the employer ex post, a difficult and ultimately futile inquiry. Rather, the relevant question is whether the trustee’s conduct is consistent with the understanding that the employees and the employer would have reached had they bargained over the issue ex ante. Any other approach will lower the rate of plan formation to the detriment of employees and employers alike.

expressly permits them.⁵⁵ In this regard, ERISA § 408(c)(3) states: “[n]othing in [the prohibited transaction rules] shall be construed to prohibit any fiduciary from . . . (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.”⁵⁶ It may be, as Professor Langbein has recently suggested, that “[t]he court-created disclosure duties of ERISA fiduciaries respond to (and to some extent compensate for) the widespread use of conflicted fiduciaries in ERISA plan administration.”⁵⁷ Moreover, allowing non-neutral fiduciaries helps to promote the formation of voluntary ERISA benefit plans.⁵⁸

Consequently, ERISA does not prohibit an officer or employee of a given employer from being a fiduciary or trustee to the plan while simultaneously acting in a corporate or non-fiduciary capacity. In her non-fiduciary capacity, the officer or employee of the company may act as a settlor to establish, modify, amend, or terminate a plan without becoming a fiduciary.⁵⁹ This is because

55. Perhaps, ERISA drafters permitted dual role fiduciaries because they feared that if ERISA required employers wanting to set up employee benefit plans to contract out its plan administration to a third-party administrator, many companies who otherwise might offer such plans would opt out all together because of the increased administration expenses and the lack of control over plan design. See Fischel & Langbein, *supra* note 25, at 1127 (suggesting that permitting dual role fiduciaries promotes the rate of plan formation under ERISA by giving employers investment and design authority); see also *id.* at 1128 (recognizing that ERISA § 408(c)(3) makes some sense if one considers that under some circumstances the employer may also be a beneficiary of the plan).

56. ERISA § 408(c)(3). In turn, a “party in interest” under ERISA specifically includes “an employer any of whose employees are covered by [an employee benefit] plan.” § 3(14)(C); see also *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (acknowledging the permissibility of an employer’s being both a settlor and fiduciary in the context of a welfare benefit plan); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (acknowledging the permissibility of an employer’s being both a settlor and fiduciary in the context of a retiree benefit plan).

57. See Langbein, *supra* note 35, at 950-51. Langbein, along with Professor Fischel, has also maintained that, “[t]he tension [of having nonneutral fiduciaries] disappears once it is recognized that in pension plans, unlike traditional trusts, employers and employees are both settlors and beneficiaries. Dual loyalty is simply a recognition of this basic point”. See Fischel & Langbein, *supra* note 25, at 1126.

58. See John H. Langbein, *What ERISA Means By “Equitable”: The Supreme Court’s Trail of Error in Russell, Mertens, and Great West*, 103 COLUM. L. REV. 1317, 1327-28 (2003) (“In order to encourage employers to sponsor plans, ERISA facilitates the use of employer personnel as plan fiduciaries, in tension with the disinterested intermediary who is the prototype in ordinary trust law.”).

59. See *Curtiss-Wright*, 514 U.S. at 78.

according to the “settlor-function doctrine,” in taking these settlor actions, the company and its agents are not engaging in discretionary activity with regard to the plan and therefore, are not subject to fiduciary liability.⁶⁰ Indeed, since much depends on whether a company or individual is characterized as a fiduciary or settlor, it is not surprising that much time and litigation expenses have been spent trying to determine which capacity a company and its agents in a particular case are acting when interacting with plan participants and beneficiaries with regard to their plan benefits.⁶¹

What has not been explored to the same degree is the plight of a company’s counsel, whether in-house or outside,⁶² when the company chooses to become a dual role fiduciary. The company will then act at different times, through the same and different officers and employees, in both its employer and fiduciary capacities. In this context, the question then arises whether counsel should ever represent a company in both its employer and plan fiduciary capacities.⁶³

In order to properly discern the ethical dilemmas that corporate counsel faces in such dual representation scenarios, it is first necessary to understand the rules of professional responsibility as they concern the identification of the client in the corporate context and how to resolve concurrent conflicts of interest when counsel simultaneously represents two adverse entities. Therefore, this article next turns to a general discussion of an attorney’s ethical obligations in the corporate context.

III. ETHICAL OBLIGATIONS OF CORPORATE COUNSEL IN THE ERISA CONTEXT

Much of the confusion over whom ERISA counsel represents when a company acts as both as an employer (plan sponsor) and

60. See *supra* note 8 and accompanying text.

61. See, e.g., *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-45 (1999) (finding that amending a contributory defined benefit plan is a settlor function); *Spink*, 517 U.S. at 887-91 (concluding that amending a retirement plan is a settlor function not subject to fiduciary liability); *Varity Corp. v. Howe*, 516 U.S. 489, 505-06 (1996) (holding that amending or terminating a welfare plan is not an act of plan management or administration); *Curtiss-Wright*, 514 U.S. at 78 (finding that adopting, amending, or terminating an employee welfare plan is not a fiduciary action).

62. “[The Model Rules of Professional Conduct] draws no distinction between in-house and outside counsel, or among types or sizes of entities.” See *EMPLOYEE BENEFITS LAW*, *supra* note 20.

63. Although some might argue that such dual representations are rare, contemporary scholarship and recent litigation suggest otherwise. See *supra* note 20 and accompanying text.

fiduciary (plan administrator) with regard to an employee benefit plan can be traced to the Model Rules of Professional Conduct. Indeed, when the employer and plan act through the same individual or group of individuals as permitted by ERISA, ERISA counsel can inadvertently find themselves representing two adverse entities.⁶⁴ Even when a company attempts to avoid these direct conflicts of interest within the same person by appointing one officer to represent the employer (for example, the President or CEO) and a different officer to represent the plan (for example, the Human Resources Manager),⁶⁵ corporate counsel still must decide which entity (and/or individuals) they should represent, if any, in such concurrent conflicts of interest.

To figure out the difficult ethical questions occasioned by dual role fiduciaries, it is first necessary to examine closely three Model Rules of Professional Conduct: Rule 1.13 concerning the identity of the client and conflicts of interest in the entity setting, Rule 1.7 dealing generally with concurrent conflicts of interest, and Rule 1.9 dealing more specifically with conflicts of interest concerning former clients. These rules will be examined with a focus on their impact on corporate counsel in the ERISA context and whether such rules provide sufficient ethical guidance in such circumstances.

A. *An Entity Theory of Ethics: Rule 1.13*

Although Model Rule of Professional Conduct 1.13 has evolved since its adoption in 1983, it generally sets up an “entity theory of ethics.”⁶⁶ Under this entity theory, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”⁶⁷ However, if there is a conflict of interest between the entity and an individual director,

64. ERISA § 402(c)(1). Not only does confusion result when an attorney represents a given company in its employer and plan capacities, but even within the plan itself, it is not always clear whether the attorney represents the plan as an entity, the fiduciaries of the plan, or both. See John L. Utz, *Ethical Considerations in ERISA Litigation*, SK079 ALI-ABA 1011, 1013 (2005).

65. Further, the employer may appoint different corporate officers to undertake different types of fiduciary duties with regard to the plan. See Fischel & Langbein, *supra* note 25, at 1126 (observing in this vein that “[i]n single employer plans, higher officers of the firm frequently oversee plan investments while other managers handle various types of benefit determination”).

66. See ROTUNDA & DZIENKOWSKI, *supra* note 24, at 484.

67. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (1983). As the commentary to the Rule aptly points out, entities necessarily act through authorized agents. See *id.* at R. 1.13 cmt. 1.

officer, or employee of the entity, counsel's first loyalty is to the entity, and she must make clear such allegiance to individuals when it is evident that the individuals' interests are adverse to those of the organization.⁶⁸ That being said, counsel for an entity may generally represent both the entity and individuals connected with the entity when there is no conflict of interest between them, and even when there is a conflict, the corporate entity can agree, through a proper written consent, to have counsel represent both the entity and the individual.⁶⁹

Rule 1.13 only helps counsel identify the various clients in such situations and leaves unanswered the question about whom corporate counsel should represent in a conflict between two entities. For instance, if a company chooses to act as both the employer and a fiduciary to a plan, as permitted by ERISA § 408(c)(3), the lawyer has essentially agreed to a joint representation of two entities, and their duly authorized constituents. On the one hand, the attorney represents the company in its plan sponsor or settlor capacity, or what one might refer to as its normal corporate decision-making capacity. On the other hand, the attorney represents the employee benefit plan, as a separate entity, and its duly authorized constituents, including the plan administrator and other plan fiduciaries and trustees, who might very well be the same corporate officers of the company.⁷⁰

The problem is compounded here because even though ERISA permits individuals and entities to serve as dual role fiduciaries, thereby allowing them to simultaneously maintain the inherently conflicted roles of employer and fiduciary,⁷¹ ERISA provides no guidance to attorneys who represent the company in both its employer and fiduciary capacities when a conflict of interest arises between the two entities.⁷² To gain further insight

68. *Id.* at R. 1.13(f); *see also* Rule 4.3 (setting forth a duty to inform an unrepresented individual of potential adversity between that individual and the attorney's client').

69. *Id.* at R. 1.13(g).

70. That being said, as far as the lawyer's responsibility, under the law, to the participants and beneficiaries of the plan, the majority rule is that, "a lawyer who represents a fiduciary does not also represent the beneficiaries." *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 380, at 1 (1994).

71. *See* Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 663 (2004) (discussing the inherent conflict of interest that exists when an employer acts as both plan sponsor and plan fiduciary).

72. Nor is this state of affairs surprising, as what is at stake is not a legal

into how attorneys should ethically handle these concurrent conflicts of interest, it is necessary to turn to Rule 1.7.

B. Concurrent Conflicts of Interest Under Rule 1.7

Model Rule of Professional Conduct 1.7 requires that if a concurrent conflict of interest arises between two separate clients represented by the same attorney, such conflicts must be resolved under Rule 1.7 or the attorney must not represent one of the clients.⁷³ In turn, a “concurrent conflict of interest” is defined as either a direct conflict between two clients of the same lawyer,⁷⁴ or as involving a “significant risk” that the lawyer’s representation of one or more client will be “materially limited” by the lawyer’s responsibilities to another client, former client, or by a personal interest of the lawyer.⁷⁵

If there is a concurrent conflict of interest, an attorney may represent both of the parties involved in the conflict only if four conditions are met. First, the lawyer must “reasonably believe” that she will be able to deliver competent and diligent representation to all parties involved.⁷⁶ Second, the representation must not be prohibited by law.⁷⁷ Third, the representation cannot involve a claim by one of the clients against the other in the same litigation.⁷⁸ Fourth, and finally, each client must give written, informed consent to the representation.⁷⁹

With regard to corporate counsel whose clients include both the corporate entity and the employee benefit plan, there is no issue concerning the second condition, as there is nothing in ERISA which prohibits representation of such dual role fiduciaries. As for the fourth condition, there might be more of an issue, as Rule 1.13(g) does not permit a person involved in a conflict of interest to consent to the conflict on behalf of the entity.⁸⁰ Consequently, it would appear that the corporation would

obligation under ERISA, but rather an ethical duty under state-based professional ethics standards.

73. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(discussing conflict of interest issues).

74. *Id.* at R. 1.7(a)(1).

75. *Id.* at R. 1.7(a)(2).

76. *Id.* at R. 1.7(b)(1).

77. *Id.* at R. 1.7(b)(2).

78. *Id.* at R. 1.7(b)(3).

79. *Id.* at R. 1.7(b)(4).

80. There is some doubt as to whether such consent would be effective since the company would be consenting on behalf of two entities over which it exercises control. See *id.* at R. 1.7 cmt. 29 (discussing certain common representation scenarios where there are conflicts of interests of which the parties may not consent).

have to have someone in the organization not involved in the conflict between the company and the plan (which may or may not be possible) give written consent to the on-going conflict of interest.

And as daunting as that issue may appear, there are even more potentially difficult issues regarding the first and third conditions under Rule 1.7(b). With regard to the first condition, whether the attorney could reasonably believe that she could provide equally diligent and competent representation to both the employer and plan, would depend upon the totality of the circumstances. Such circumstances would include the corporate structure, the responsibilities the counsel actually has with regard to each entity, and whether counsel is in-house or outside counsel.⁸¹ Moreover, there are circumstances in which the company in its employer and fiduciary capacities will be at opposite tables in the same courtroom and, in such cases, counsel will no doubt have to withdraw from both representations given the third condition of Rule 1.7(b).⁸²

What can be gathered from this cursory analysis of Rule 1.7 and concurrent conflicts of interest in general is that there is no bright line answer to whether an attorney can simultaneously represent the employer and fiduciaries in the same company. It depends on what the attorney "reasonably believes," given the conflict with which she is presented.⁸³ If counsel believes that the requisite competence and diligence cannot be exercised under the circumstances, the attorney must then decide whether to withdraw her representation from both clients, at least until such time as the conflict is resolved, or to continue to represent one client and not the other. To explore what obligations counsel would have to the dropped client if counsel chooses to continue

81. The last factor is of necessary importance, as outside counsel will be much more easily able to exercise the independent judgment necessary to make this difficult decision; whereas in-house counsel will be hard pressed to maintain her professional independent judgment with regard to each client under such circumstances. See ROTUNDA & DZIENKOWSKI, *supra* note 24, at 487 (noting some very important practical differences between in-house counsel and outside counsel when it comes to the representation of a corporate client, including the fact that in-house counsel only has one client).

82. Accord Steven D. Spencer, *Ethical Issues Arising in ERISA Practice*, AMER. BAR ASSOC. CTR. FOR CONTINUING LEG. EDUC. NAT. INSTIT., N99ELI ABA-LGLED I-1, I-17 (Nov. 1999) (observing that even concerns of economic efficiency will not overcome the real and truly disqualifying conflicts in dual role fiduciary joint representations).

83. Of course, this assumes that there does not exist a non-consentable situation under Rule 1.7(b)(2) or (3).

representation of one of the entities, it is necessary to consider Rule 1.9 regarding former clients.

C. Former Clients and the Limits Imposed by Rule 1.9

If corporate counsel decides to continue her representation of the employer but to withdraw her representation from the employee benefit plan because of a concurrent conflict of interest, the ongoing obligations of counsel to the company as fiduciary to the employee benefit plan would have to be determined. Indeed, such ethical limitations based on representing the employee benefit plan as a former client might make it significantly difficult for counsel to continue to effectively represent the interests of the company in its employer capacity. In this regard, the Model Rules of Professional Conduct seem to suggest that an attorney who initially represents both the employer and fiduciary within the same company may withdraw from the company in its fiduciary capacity, but in continuing to represent the employer would be limited in this representation based on the guidelines for former clients provided in Rule 1.9.

For instance, what if the reason counsel withdrew from representing the employee benefit plan was because there was about to be direct litigation between the company and the plan? Clearly, under these circumstances, Rule 1.7 prohibits a concurrent representation of both parties regardless of consent.⁸⁴ Even after corporate counsel effected her withdrawal of representation from the employee benefit plan and continued her representation of the employer, counsel would be prohibited from advising the employer in situations in which she represented the employee benefit plan on the same or substantially same matter, unless the former client gave informed consent, confirmed in writing.⁸⁵ Especially where officers of the company serve as both corporate officers and plan trustees,⁸⁶ it is hard to know whether such consent would be effective given the fact that individuals involved in the conflict cannot consent on behalf of the entity under Rule 1.13(g).⁸⁷ Moreover, in subsequent matters, the attorney could not use information relating to the plan that she learned as counsel to the plan unless the information had become general knowledge or if the Rules otherwise required or permitted use of such information.⁸⁸

84. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 23, 29.

85. *Id.* at R. 1.9(a).

86. As was the case in *Donovan*, 680 F.2d 263, discussed in depth in Part IV, *infra*.

87. See MODEL RULES OF PROF'L CONDUCT R. 1.13(g).

88. *Id.* at R. 1.9(c).

Clearly, then, the former client counsel limitations could make a continuing representation of the employer so constrained that the only responsible thing for counsel to do would be to withdraw from the representation of the company in its employer capacity as well. In any event, in all of this maneuvering, there would be much wasted time, resources, and money, as the plan sponsor and the employee benefit plan would have to seek new counsel, who would then have to familiarize themselves with the current dispute between the two parties.⁸⁹ Such an outcome is not ideal for the company in general, and certainly not ideal for those company officers who find themselves without experienced counsel from either the fiduciary or employer side of the equation.⁹⁰

IV. ERISA DUAL ROLE FIDUCIARIES, CORPORATE COUNSEL, AND THE MODEL RULES OF PROFESSIONAL CONDUCT

Having examined in some detail the relevant ethical rules that come into play when an attorney contemplates representing an ERISA dual role fiduciary in both capacities, it is helpful to consider an actual case to see what ethical problems may arise in cases where attorneys have chosen to undertake such a dual representation. One such complicated dual capacity fiduciary case is the well-known case of *Donovan v. Bierwirth*.⁹¹ Although *Donovan* was decided in 1982, before the Model Rules of Professional Conduct existed,⁹² considering the in-house counsel's ethical obligations in *Donovan* under the current version of the Model Rules of Professional Conduct demonstrates the inadequacy of the Model Rules in the dual role fiduciary context.⁹³

89. See Spencer, *supra* note 82, at I-17 ("By retaining a single counsel who, through longstanding contact, is thoroughly familiar with the employer's business and the sponsored plans, the parties are more likely to receive competent legal advice at a reasonable cost. Interposing ethical constraints that are more theoretical than real detracts from this efficiency and increases transaction costs through the hiring of new attorneys to service theoretical individual interests.").

90. *Id.*

91. 680 F.2d 263 (2d Cir. 1982).

92. The Model Rules of Professional Conduct were first enacted in 1983. Since that time, there have been important amendments to many of the individual rules discussed herein, including amendments to Rule 1.13 in both 2002 and 2003. See ROTUNDA & DZIENKOWSKI, *supra* note 24, at 7-12 (discussing the Model Rules of Professional Conduct).

93. For a more recent and well-known example of the problems surrounding dual role fiduciaries under ERISA, one need look no further than the post-Enron collapse litigation, which serves as an example of the problems that occur when a dual role fiduciary does not act with an eye single to the interests of the plan's participants and beneficiaries. See Laby, *supra* note 53, at 142 (stating that Enron employees who participated in three ERISA

A. *Donovan v. Bierwirth: A Case Study of an Inherently
Conflicted Counsel in the ERISA Dual-Role Fiduciary Context*

1. *Facts Surrounding the ERISA Dual Role Fiduciaries' Breach
of Fiduciary Duty*

In *Donovan*, corporate officers of the Grumman Corporation were also trustees of the company's pension benefit plan.⁹⁴ In particular, the employer and plan fiduciary capacities of the company co-existed in the persons of John C. Bierwirth (chairman of the Board of Directors), Robert G. Freese (the chief financial officer), and Carl A. Paladino (treasurer).⁹⁵ The company and the plan were in turn both represented by the associate general counsel of Grumman, John Mullan.⁹⁶

The conflict of interest between Grumman and its pension plan arose when a hostile takeover bid was initiated by LTV Corporation in the fall of 1981.⁹⁷ LTV offered to buy up to 70% of the outstanding common stock of Grumman at \$45 per share, while the Grumman shares at the time were trading in the \$24-\$27 range.⁹⁸ At the time of the tender offer by LTV, the Grumman pension plan owned approximately 4% of the company (or some 525,000 shares of Grumman).⁹⁹ Through its corporate officers, including Bierwirth, Freese, and Paladino, Grumman fought aggressively against the LTV takeover bid and attempted to convince its shareholders that they should not sell their shares of stock to LTV.¹⁰⁰ Moreover, as trustees of the Grumman pension plan, the same three individuals not only decided not to sell the pension plan's shares to LTV, but made it even more difficult for LTV to succeed in its tender offer by having the pension fund buy another 1.158 million shares of Grumman stock at the then-inflated price of \$36-\$39/share.¹⁰¹ Thus, through both corporate and pension plan action, Grumman and its officers/trustees were

employee pension benefit plans alleged that "committees, trustees, and individuals administering the plans, many of whom were individual officers and directors of Enron, breached their fiduciary duties under ERISA" (citing *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003)).

94. *Donovan*, 680 F.2d at 264.

95. *Id.* at 267.

96. *Id.*

97. *Id.* at 265-66.

98. *Id.* at 266.

99. *Id.* at 269.

100. *Id.* at 266-67.

101. *Id.* at 269. As a result, the plan went from owing a little less than 4% of Grumman's outstanding shares to owning 8% of those shares. *Id.*

able to help defeat the takeover attempt by LTV.¹⁰² After the LTV offer was defeated, the price of Grumman stock eventually dropped to about \$26/share. As a result, the pension plan lost, at the time of the Second Circuit's decision in 1982, approximately \$12 million.¹⁰³

In this scenario, there was a clear conflict of interest between the corporate officers' role as fiduciaries to the shareholders¹⁰⁴ and their role as trustees with fiduciary duties to the participants and beneficiaries of the pension plan.¹⁰⁵ Most obviously, the pension plan could have made a handsome profit for plan participants and beneficiaries by accepting LTV's offer at \$45/share when shares were selling in the \$25/share range (with 500,000 shares in hand, that would have been over a \$10 million profit).¹⁰⁶ Not only did the trustees not seem to heed what was in the best interests of the participants and beneficiaries by not agreeing to sell the shares,¹⁰⁷ but they compounded their breach of fiduciary duty by having the

102. *Id.* As it actually happened, the LTV take-over bid was doomed to failure because its tender offer was eventually enjoined by the district court based on inadequate disclosures and a potential antitrust violation under Section 7 of the Clayton Act. *See id.* at 265 (citing *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86 (E.D.N.Y.), *aff'd*, 665 F.2d 10 (2d Cir. 1981)). Nevertheless, the fact that the take-over bid would have failed even without the Grumman officers' intervention did not excuse those officers' breach of fiduciary conduct to the plan's beneficiaries. *Id.* at 271.

103. *Id.* at 269. Interestingly, seventeen months after the trustees' purchase of Grumman stock to fend off the LTV hostile take-over bid, they sold the Grumman shares, with the permission of the district court, at over \$47/per share and earned over \$13 million through this investment. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1051 (2d Cir. 1985). Although this eventual outcome is interesting from the standpoint of determining whether there was an "investment loss" for purposes of personal fiduciary liability under ERISA § 409, the eventual success of the investment does not take away from the fact that the plan trustees breached their fiduciary duties by failing to act at all times with the best interests of the plan participants and beneficiaries in mind. *See Donovan*, 680 F.2d at 276 (finding that the trustees had not measured up to the high standards imposed by sections 404(a)(1)(A) and (B) of ERISA); *see also id.* at 271 (noting that ERISA trustees have a duty "to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan").

104. *See Smith*, *supra* note 51, at 278.

105. ERISA § 404(a)(1)(A). Of course, there might also have been a conflict based on the personal interests of the officers involved given their likely ownership of company stock. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

106. *Donovan*, 680 F.2d at 265-66.

107. *Id.* at 273-74.

pension plan buy an additional million shares of Grumman stock at an inflated, post-LTV offer price of \$36-\$39/share.¹⁰⁸

In bringing a suit against Grumman and its officers/trustees on behalf of the plan participants and beneficiaries, the Secretary of Labor alleged that the company and its officers/trustees had breached a number of fiduciary duties under ERISA § 404.¹⁰⁹ Indeed, the Secretary was successful in bringing these claims, as the officers/trustees had quite clearly not acted with an "eye single" to the interests of the participants and beneficiaries in attempting to defeat the LTV tender offer.¹¹⁰ Unlike in *Varity*, however, the *Donovan* court, in the voice of Judge Friendly, specifically addressed the ethical dilemma in-house counsel faced in representing Grumman in both its corporate and fiduciary capacities.

2. *The Ethical Obligations of In-House Counsel When Representing ERISA Dual Role Fiduciaries*

As stated above, John Mullan was not only the associate general counsel of Grumman, but he also acted as counsel to the trustees concerning their pension plan obligations.¹¹¹ From the facts of *Donovan*, it is clear that Mullan attempted to advise the plan trustees of, at least, their fiduciary obligations to act in the best interests of the participants and beneficiaries.¹¹² Although it is less clear whether Mullan was involved in the Grumman Board of Director's decision to oppose the LTV tender offer, there is reason to believe that as associate general counsel he would have been involved in the Board's actions in this regard.¹¹³

108. *Id.* at 274 ("An even more telling point against the trustees is their swift movement from a decision not to tender or sell their shares already in the fund to a decision to invest more than \$44,000,000 in the purchase of additional Grumman shares up to the 10% maximum permitted by § 407(a)(2) of ERISA."); *see also id.* at 275 ("Moreover, and even more important, in purchasing additional shares when they did, the trustees were buying into what, from their own point of view, was almost certainly a 'no-win' situation.").

109. *Id.* at 264. Prohibited transaction claims under ERISA § 406(b) were also brought, but unsuccessfully. *Id.*

110. In *Donovan*, the court concluded that it was "almost impossible to believe that [the trustees]... motive for purchasing the additional shares was for any purpose other than blocking the LTV offer." *Id.* at 275.

111. *Id.* at 272.

112. *Id.* at 268 (describing a ten-minute presentation Mullan made to the plan trustees, which included mention of the trustee's obligations to act in the best interests of the participants of the plan).

113. *See id.* at 266-67 (not specifically placing Mullan at the Board of Director's meeting which decided to oppose the LTV tender offer); *but see id.* at 272 (noting that Mullan, as in-house counsel, was under a "similar disability"

Consequently, it appears that Mullan was in the position of counseling two separate entities at the same time that had a direct conflict of interest with one another. Although Mullan in his legal capacity was most likely not acting in a fiduciary capacity, and thus was not in violation of a duty imposed by ERISA,¹¹⁴ there is nevertheless the serious ethical question that needs to be addressed under the Model Rules of Professional Conduct concerning concurrent conflicts of interest.

In order to discern Mullan's ethical obligations under these circumstances, it is necessary to start by identifying the various clients represented by Mullan in his position as associate general counsel to the Grumman Corporation. In fact, he actually represented *two* separate entities based on Rule 1.13: the employer and the pension plan. Consequently, when the employer and plan had a directly conflicting interest, or at least there was a significant risk that the representation would be materially limited as a result of the LTV bid,¹¹⁵ Mullan had an ethical duty to resolve that concurrent conflict of interest under Rule 1.7.

Yet, Mullan was under a "similar disability" as the director/trustees themselves.¹¹⁶ As Judge Friendly observed, Mullan was a junior employee in the organization and could have "hardly been expected to tell the trustees that the better course would be to resign or even to suggest investigations which might alter the judgment of total commitment to defeating the LTV offer that management had already expressed."¹¹⁷ Although the court refused to lay down a *per se* rule that dual role fiduciaries must always engage independent counsel for the plan in such circumstances, Judge Friendly suggested that Mullan should have

as the director/trustees in being torn between divided loyalties).

114. See *Thayer*, *supra* note 15, at 725.

115. There was a direct conflict of interest because even though selling the pension plan stock to LTV might have been in the best interest of the plan and the prudent thing for the fiduciaries to do under the circumstances, Grumman, in its corporate capacity, had clearly decided that it was in the best interests of its shareholders to fight off the LTV tender offer. *Donovan*, 680 F.2d at 272. Because the corporate officers and the trustees of the pension plan were the same people, they had an irreducible conflict of interest in the two roles which they occupied. See *id.* ("Bierwirth and Freese should have been immediately aware of the difficult position which they occupied as a result of having decided as directors some of the same questions they would have to decide as trustees, and should have explored where their duty lay."). And even if the interests involved were not directly adverse, there was a very significant risk that his continued representation of both entities would materially limit Mullan's responsibilities to each of his clients. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

116. *Donovan*, 680 F.2d at 272.

117. *Id.*

withdrawn his representation from the plan, and that the company should have hired an independent counsel who, in the court's words, was "above the battle."¹¹⁸

Judge Friendly's hunch on how the company should have acted in this instance appears consistent with a concurrent conflicts of interest analysis under the current version of Model Rule 1.7. Consistent with Rule 1.7, Mullan should have reasonably believed that in representing both the employer and the plan, he would not be sacrificing the competent and diligent representation which each of the affected clients deserved.¹¹⁹ Based on his junior standing and unwillingness to derail the company's plan of fighting off the LTV offer, *objectively*, Mullan was unable to satisfy his ethical responsibilities in this regard.¹²⁰ Furthermore, and considering the language of Rule 1.7(b)(4),¹²¹ there does not seem to have been any way to have resolved this conflict, as this appears to be one of those conflicts wherein the positions of the two entities are so diametrically opposed that a good faith, written consent to dual representation could not have been obtained.¹²² Thus, the Rule 1.7 analysis leads inexorably to

118. *Id.* at 272-73.

119. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1); see also *id.* at R. 1.7 cmt. 14. Although many concurrent conflicts of interests are waivable if client consent is obtained, certain conflicts may not be consented to by the parties. Included in this category of conflicts are those scenarios involving circumstances under which the lawyer cannot reasonably conclude that he will be able to provide the necessary level of competence and diligence to both clients. *Id.* at R. 1.7 cmt. 15.

120. Mullan must have had more than a subjective belief that he could have diligently and competently represented both entities; the Model Rules require that he "reasonably believed" that such representation would be effective, suggesting an objective standard based on what the prudent attorney would have done under similar circumstances. See Florence Vincent, *Regulating Intimacy of Lawyers: Why Is It Needed and How Should It Be Approached*, 33 U. TOL. L. REV. 645, 656 (2002) ("The consent called for in [Model Rule] 1.7(b) must be effective, which incorporates the objective standard called for by how a reasonable lawyer would act.").

121. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) ("[A] lawyer may represent a client if: . . . (4) each affected client gives informed consent, confirmed in writing.").

122. See R. 1.13(g) (persons involved in conflict of interest themselves cannot consent to conflict on behalf of entity). In other words, this set of circumstances might represent one of those common representation situations in which the lawyer cannot be impartial between the two entities because of what is required of her in advising one entity versus the other. *Id.* at R. 1.7 cmt. 29. Moreover, a situation to which parties may not consent would also arise in this case because the employer, as plan sponsor, was being sued by the plan administrator on behalf of the participants and beneficiaries of the plan. *Id.* at R. 1.7 cmt. 17 ("Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in the vigorous

the same conclusion that Judge Friendly came to without the benefit of the Model Rules of Professional Conduct. Under the facts of *Donovan*, Mullan should not have been permitted to represent both the employer and the plan, and an independent counsel should have been brought in to advise and counsel the plan trustees under the circumstances.¹²³

Although it is conceivable that Mullan, once he recognized his inherently conflicted position, could have continued his representation of the company, better practice dictates that Mullan should have completely withdrawn from representing the company in both its employer and plan administrator capacity in this or substantially similar matters in the future.¹²⁴ This is because Mullan's representation of the company as employer most likely would have required him to rely on information that he had previously learned in his former capacity as counsel to the plan.¹²⁵

In this regard, the Model Rules seem fairly unambiguous in stating that "the lawyer who has formerly represented a client in a manner *shall* not thereafter represent another person in the same . . . manner in which that person's interests are materially adverse to the interests of the former client."¹²⁶ Moreover, even if

development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.").

123. In addition, Mullan's representation of both the corporation and the plan under these circumstances might have been materially limited by his own personal interests in the outcome of the hostile takeover bid, since not only did he likely have Grumman stock options, but his very employment and livelihood were at stake if he disenchanted Grumman. Consequently, he might have been conflicted out of this dual representation on this basis as well. *Id.* at R. 1.7(a)(2).

124. *See id.* at R. 1.7 cmt. 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.").

125. *See supra*, Part III.C (discussing former clients and the limits imposed by Rule 1.9).

126. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (emphasis added). As argued previously, the interests of the plan and the company seem "materially adverse," so Mullan should not have been permitted to represent the company in the LTV manner. *See id.* at R. 1.9(b)(1) (stating that a lawyer cannot represent a person whose interests are "materially adverse" to those of a former client. Although Rule 1.9(a) allows for informed written consent, it is hard to see how the trustees of the plan in that capacity could give that consent in good faith, since they themselves, in their corporate capacity, would benefit from that consent. In other words, this looks like a situation where consent may not be given. *See supra* notes 80 and 122 and accompanying text. In any event, and at the very least, to the extent that independent counsel is brought in to advise the plan, that counsel would have to make sure that if consent were to be given to a joint representation by the plan, that such a decision would be based on the best interests of the plan's participants and

the company's and plan's interests were not considered "materially adverse" in the LTV manner, given that an independent counsel could have conceivably come to a conclusion that the plan trustees should not have offered up their shares to LTV; nevertheless, "a lawyer who has formerly represented a client *shall* not thereafter: (1) use information . . . to the disadvantage of the former client . . .; or (2) reveal information relating to the representation"¹²⁷ In short, Mullan would have been hard-pressed to diligently and competently continue to represent Grumman, even solely in its employer capacity, with these limitations placed on his representation.¹²⁸

V. DISCOURAGING THE JOINT REPRESENTATION OF ERISA DUAL ROLE FIDUCIARIES THROUGH USE OF THE MODEL RULES

A. *The Inadequacy of the Current Model Rules in Guiding Corporate Counsel's Representation of ERISA Dual Role Fiduciaries*

The foregoing analysis of the *Donovan* case under the current version of the Model Rules of Professional Conduct suggests that corporate counsel who find themselves in these ERISA joint representation scenarios are left to dangle in the ethical winds. Although use of the current Model Rules leads to the same conclusion arrived at in *Donovan*, that counseling dual role fiduciaries in both their employer and plan capacity is almost never a good idea,¹²⁹ there will still be the temptation for

beneficiaries and not based on decisions made by those personally involved in the conflict of interest like the officers/trustees of Grumman in the *Donovan* case.

127. MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (emphasis added). Mullan could only use such information about the plan if the information had become general knowledge or the Rules would permit or require such use of the information with respect to the client. *Id.*

128. Note that under Rule 1.9(b), if Mullan had instead been outside counsel for either the plan or company, and attempted to move to a different law firm to represent the plan, he would still be at the mercy of Grumman to provide informed consent in writing. Just as with the in-house counsel situation, receiving consent from Grumman under these circumstances would be unlikely given that Mullan would probably have acquired information about Grumman during his former representation which would be protected by the confidentiality provisions of Rule 1.6. See *id.* at R. 1.9(b)(2).

129. But see Spencer, *supra* note 82 at I-17:

Depending on the specific issue the attorney is handling, such multiple representation can be more a benefit to the clients than a disadvantage. By retaining a single counsel who, through longstanding contact, is thoroughly familiar with the employer's business and the sponsored

companies to permit such legal arrangements. On the one hand, companies looking to save money on increasingly costly pension and health plans will rely upon corporate counsel in advising them on fiduciary matters to the extent that they undertake the plan trustee role.¹³⁰ Indeed, many employers may place themselves in these dual-role positions in the first place simply to avoid the extra cost of having to hire a third-party plan administrator.¹³¹ Of course, it may just be that companies are willing to waive whatever prospective conflicts there might be in order to have the comfort of retaining a familiar benefits counsel.¹³² Finally, regardless of the inevitable conflicts of interest which will arise under these circumstances, it might be that corporate counsel will not have the strength of conviction to raise these concerns (as Mullan seemed unwilling to do in *Donovan*), or they will not discern the relevant ethical issues in the first place.¹³³ Consequently, the difficult position in which attorneys like Mullan find themselves will most likely continue to exist.

On the other hand, requiring companies to hire independent counsel to advise the plan when there are conflicts of interest between the plan and company seems incompatible with the

plans, the parties are more likely to receive competent legal advice at a reasonable cost. Interposing ethical constraints that are more theoretical than real, detracts from this efficiency and increases transaction costs through the hiring of new attorneys to service theoretical individual interests. Although the concerns of economic efficiency will not overcome the real (and truly disqualifying) conflict, it should have at least some influence on the resolution of the various problems associated with multiple representation in ERISA.

130. In fact, because ERISA makes the employer the "default" plan administrator, there is no reason to believe that there will be less dual role fiduciaries in the near future. ERISA § 3(16)(A)(ii).

131. See Spencer, *supra* note 82, at 1-17 ("By retaining a single counsel who, through longstanding contact, is thoroughly familiar with the employer's business and the sponsored plans, the parties are more likely to receive competent legal advice at a reasonable cost."); see also Fischel & Langbein, *supra* note 25, at 1127 (suggesting that permitting dual role fiduciaries promotes the rate of plan formation under ERISA by giving employers investment and design authority).

132. See Spencer, *supra* note 82, at 1-17. Concerning prospective waivers of conflicts of interests, such waivers succeed or fail by the same conditions set out in Rule 1.7(b), but their enforceability also depends to a large extent on whether the clients reasonably understand the material risks that the waiver entails. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22.

133. The likelihood that corporate counsel will not perceive the relevant conflicts of interest in such joint representations is most likely to occur when corporate counsel has no specific expertise in the complex area of ERISA and inadvertently undertakes such a representation. EMPLOYEE BENEFITS LAW, *supra* note 20, at 1441-42.

voluntary nature of offering ERISA plans¹³⁴ and the subsidiary purpose of ERISA in not making it too costly for employers to provide employee benefit plans in the first place.¹³⁵ Moreover, and by and large, most ethical rules under the Model Rules of Professional Conduct are appropriately discretionary to some extent and “[i]t is not . . . the purpose of the Model Rules to legislate specific ethical mandates.”¹³⁶ In short, it does not seem appropriate to promulgate a mandatory ethical rule when in some circumstances counsel could reasonably believe jointly representing the company in its employer and plan capacity would not interfere with diligent and competent representation of both parties.¹³⁷

Nevertheless, an advisory rule concerning joint representation of ERISA dual role fiduciaries would still be valuable since by the relationship’s very nature, dual capacity fiduciaries are inherently conflicted.¹³⁸ In other words, there will most likely come a time when there will be another conflict of interest between the company and the plan even after the initial

134. See Susan J. Stabile, *Freedom to Choose Unwisely: Congress’ Misguided Decision to Leave 401(k) Participants to Their Own Devices*, 11 CORNELL J. L. & PUB. POLY 361, 400 (2002) (“Any suggestion for pension reform must be assessed in light of the reality that pension plan sponsorship is voluntary. ERISA imposes significant substantive regulation on pension plans, but leaves the decision whether to offer a pension plan in the first place to employers.”).

135. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) (describing the “subsidiary goal” of ERISA as “containing pension costs”).

136. See Paul M. Secunda, Note, *Cleaning Up The Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1291 (1997).

137. Accord Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 234 (1993) (“Unlike legislators, code drafters perceive their goal as providing guidance for lawyers in choosing among several permissible courses of conduct.”).

138. See Laurence B. Wohl, *Fiduciary Duties Under ERISA: A Tale of Multiple Loyalties*, 20 U. DAYTON L. REV. 43, 52 (1994) (“The ERISA conflict of interest arises when ERISA fiduciaries hold positions as officers, directors or employees of the corporate or union sponsor of the ERISA plan of which they are a fiduciary. Because ERISA permits fiduciaries to hold offices which contain inherent conflicts, criteria must be established that permit the fiduciary and the courts to determine in what capacity a specific act will be, or was, taken.”); Kathryn J. Kennedy, *Judicial Standards of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1115-16 (2001) (“[T]he existence or nonexistence of an interest in the fiduciary conflicting with that of the beneficiaries has been the most controversial in ERISA benefit denial cases, as the employer/insurer is often the plan administrator and funding source of the ERISA plan and, thus, there is an inherent conflict of interest.”).

conflict of interest is resolved.¹³⁹ Such conflicts may concern as important of an issue as the future survival of the company as in *Donovan v. Bierwirth*, a more mundane decision such as whether to increase funding of the pension plan (and thus not pay out a dividend), or whether to offer an early retirement incentive based on a pension fund surplus.¹⁴⁰ In short, because counsel who jointly represents a company in the employer and plan capacity will most likely face a concurrent conflict of interest at some point in time during the joint representation, it would be better to discourage joint representation initially, so that difficult and costly decisions about plan representation need not be made in the midst of a controversy or dispute.¹⁴¹ It is with this consideration in mind that this article in the next section proposes a new Model Rule which discourages corporate counsel from jointly representing an ERISA dual role fiduciary in both its employer and plan fiduciary capacities.

*B. Proposed Model Rule of Professional Conduct 1.13(h)
with Commentary*

Based on the foregoing discussion, this Section proposes a new provision to be added to Rule 1.13, concerning the representation of organizations. Under proposed Model Rule 1.13(h), in those particular circumstances in which a company decides to undertake the duties of an ERISA dual role fiduciary, this new provision would put in place a presumption against corporate counsel, whether in-house or outside counsel, from representing the plan in both capacities. This presumption,

139. See Laby, *supra* note 53, at 141 ("When the same plan fiduciary, however, also serves as an officer or director, and therefore as a fiduciary to the company shareholders (and the company itself), conflicts inevitably arise."); see also Elizabeth J. Buck, *Making a Prudent Response to a Tender Offer: The Corporation Trustee's Dilemma Under ERISA*, 32 AM. U. L. REV. 839 (1983) ("The inherent conflicts of interest that ERISA creates by allowing corporate officials to serve as pension plan trustees are unique and may be irreconcilable as well.").

140. Such an early retirement plan and the use of pension plan surplus assets were at issue in the ERISA fiduciary case of *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

141. See *Donovan v. Bierwirth*, 680 F.2d 263, 272-73 (2d Cir. 1982) (remarking that ERISA dual role fiduciaries would do well to receive legal advice "from someone above the battle"); see also MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 ("In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination.").

however, can be rebutted by meeting the four conditions set out for resolving concurrent conflicts of interest under current Model Rule 1.7(b). In other words, if corporate counsel reasonably believes she can diligently and competently represent both the company and the plan in the long term, she can then ethically advise the company and the plan to give their informed written consent to such a joint representation.¹⁴² Nonetheless, if the company should disagree with the attorney's reasonable belief in this regard and refuse to consent to joint representation, such a joint representation would be impermissible under Rule 1.7(b)(4).

As proposed, Rule 1.13(h) would only apply to dual role fiduciaries in the ERISA context. This is because as a first matter, dual role fiduciaries do not exist under the common law of trusts because such trustees are not permitted to place themselves in an inherently conflicted position, inconsistent with their duty of loyalty to the trust's beneficiaries.¹⁴³ Moreover, although a conflict of duties often exists in other fiduciary relationships outside of the ERISA context,¹⁴⁴ it is rare that these other "fiduciary duty" conflicts exist within the same company, let alone within the same torn person as occurs with ERISA dual role fiduciaries.

In other words, and as argued above, ERISA § 408(c)(3) represents a case of ERISA exceptionalism, in which ERISA permits a significant departure from the common law of trusts and the trustee's duty of loyalty found therein.¹⁴⁵ Consequently,

142. Of course, such joint representations would always be impermissible where direct adversity leads to litigation between the employer and the plan. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3).

143. See Langbein, *supra* note 35, at 931 (stating that currently a trustee's duty of loyalty under the common law is widely regarded as "the most fundamental" rule of trust law) (citing George Gleason Bogert & George Taylor Bogert, *THE LAW OF TRUSTS AND TRUSTEES* § 543, at 217 (2d ed. 1993); Austin Wakeman Scott & William Franklin Fratcher, *THE LAW OF TRUSTS* § 170, at 311 (4th ed. 1987); Pegram v. Herdrich, 530 U.S. 211, 224 (2000)). As noted above, Professor Langbein has recently suggested a migration from the duty of loyalty's "sole interest" standard to a more modern "best interest" standard. See Langbein, *supra* note 35, at 933-34.

144. See generally Laby, *supra* note 53 (discussing conflicts of duty in fiduciary relationships involving ERISA and non-ERISA contexts).

145. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264-65 (1993) (White, J., dissenting) ("[A]bsent some express statutory departure—such as ERISA's broader definition of a responsible 'fiduciary,' . . . Congress intended that the courts would look to the settled experience of the common law in giving shape to a 'federal common law of rights and obligations under ERISA-regulated plans.'") (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989)). Section 408(c)(3) of ERISA, permitting inherently conflict dual role fiduciaries, is one such statutory departure from the common law of trusts. See Medill, *supra* note 53, at 409; Langbein, *supra* note 35, at 950-51 ("ERISA allows the plan sponsor to use company officers and other personnel as plan

because such problematic joint representations of dual role fiduciaries primarily occur under ERISA, proposed Rule 1.13(h) is only intended to apply to lawyers who seek to jointly represent dual role fiduciaries in the ERISA context.

This new provision, Model Rule 1.13(h), with commentary, should state as follows:

RULE 1.13: ORGANIZATION AS CLIENT

(h) A lawyer representing a corporation in its employer, settlor, plan sponsor, or corporate capacity should generally not also jointly represent that same corporation if it also acts as a plan administrator, fiduciary, or trustee to an employee benefit plan, unless the lawyer reasonably believes that she can comply with the requirements for resolving concurrent conflict of interests under Rule 1.7(b).

COMMENTARY

ERISA DUAL ROLE FIDUCIARIES

[36] Although ERISA permits companies and its officers, directors, and employees to act as both employer and plan fiduciary at the same time, see ERISA § 408(c)(3), a lawyer for a corporation ordinarily should not represent the company in both capacities because of the inherently conflicting nature of such joint representations. Nevertheless, although Model Rule 1.13(h) sets up a presumption against such joint representations, a lawyer for a corporation may nevertheless jointly represent the company in both employer and fiduciary capacities if she reasonably believes she can meet all the conditions set out for resolving concurrent conflicts of interest under Rule 1.7(b).

[37] To the extent that a lawyer for a corporation previously or currently represents the company in both its employer and plan fiduciary capacities, whether purposefully or through inadvertence, that lawyer should reevaluate whether continuing that joint representation is consistent with its ethical responsibilities to diligently and competently represent both entities under Rule 1.7(b)(1). If such joint representation is no longer ethically feasible, the lawyer for the corporation should withdraw from representing the plan and only continue to represent the employer to the extent

fiduciaries, hence the statute ‘expressly contemplates fiduciaries with dual loyalties,’ which is ‘an unorthodox departure from the common law rule.’”) (quoting *Donovan v. Bierwirth*, 538 F. Supp. 463, 468 (E.D.N.Y. 1981), *aff’d as modified*, 680 F.2d 263 (2d Cir. 1982)).

consistent with that lawyer's ethical obligations concerning former clients under Rule 1.9.

[38] Rule 1.13(h) is meant to apply to only the unique situation of dual role fiduciary joint representations under ERISA. This is because ERISA, unlike the common law of trusts, permits an inherently conflicted state of affairs in which a corporation is permitted to act in both an employer and plan fiduciary capacity.

VI. CONCLUSION

This article's formal analysis of a counsel's ethical obligations under the current version of the Model Rules of Professional Conduct in dual role fiduciary cases under ERISA makes evident that the current version of the Model Rules does not provide adequate guidance to corporate counsel finding themselves in these complex, inherently conflicted situations. Proposed Model Rule 1.13(h), and its commentary, would emphatically discourage corporate counsel from engaging in these risky joint ERISA representations, as such representations inevitably lead to conflicts of interest requiring counsel to withdraw from representing one or both entities.¹⁴⁶ Thus, the newly proposed Rule 1.13(h) would not only help corporate counsel discern the identity of their clients in these complicated ERISA dual role fiduciary circumstances, but would also guide counsel in undertaking the best practice in such situations by avoiding joint representation of the company in both its employer and plan fiduciary capacities in the first instance.

146. As discussed above, even if it were technically feasible for counsel to continue representing the company in its employer capacity, such representation would most likely be fatally limited based on the former client restrictions placed on counsel under Model Rule 1.9. *See supra* Part III.C.